UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

BMW MANUFACTURING CO. **AND** **INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA**	**NLRB Case No.: 10-CA-178112**

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGE

D. Christopher Lauderdale
lauderdc@jacksonlewis.com
Emily K. O'Brian
emily.obrian@jacksonlewis.com
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
(864) 232-7000 – Phone
(864) 235-1381 – Fax
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THERE IS NO BASIS FOR FINDING THAT MANAGERS CREATED THE UNLAWFUL IMPRESSION OF SURVEILLANCE 1

III. ALLEGATIONS RELATED TO RESPONDENT'S POLICIES 4

IV. ROGER YOUNGBLOOD DID NOT VIOLATE THE ACT IN HIS CONVERSATION WITH ASSOCIATES 7

V. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Camaco Lorain Manufacturing, 356 NLRB 1182 (2011) 3, 4
Conagra Foods, Inc., 361 NLRB No. 113, 2014 NLRB LEXIS 902 7,8
Farah Mfg. Co., 187 NLRB 601, 602 (1970) 8
Flagstaff Medical Center, Inc., 357 NLRB 659, 663 (2011) 4
Frontier Telephone of Rochester, Inc., 344 NLRB 1270 (2005) 1, 2, 3, 4
GTE Lenkurt, Inc., 204 NLRB 921, 921-22 (1973) 4
Hyundai American Shipping Agency, 357 NLRB No. 80 (2011) 6
Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) 4
New Process Steel v. NLRB, 560 U.S. 674 (2010) 3
NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963) 4
NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) 4
Our Way, Inc., 268 NLRB 394 (1983) 6
Park 'N Fly, Inc., 349 NLRB 132 (2007) 3
Peyton Packing Co., 49 NLRB 828, 843 (1943) 4, 8
Quickway Transportation, Inc., 354 NLRB No. 80 slip op. (2009) 3, 4
RCC Fabricators, Inc., 352 NLRB 701 (2008) 3
Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945) 4
Stoddard-Quirk, 138 NLRB 615 (1962) 7
The Boeing Company, 365 NLRB No. 154 (2017) 4, 5, 6, 7
UPS Supply Chain Solutions, Inc., 357 NLRB 1295 (2011) 6
W.W. Grainger, Inc., 229 NLRB 161, 166 (1977) 8

Pursuant to Section 102.46 of The National Labor Relations Board's Rules and Regulations, BMW Manufacturing Co. ("Respondent") Submits This Brief In Reply to The Charging Party's Answering Brief:

I. INTRODUCTION

On December 28, 2017, Respondent, BMW Manufacturing Co. ("BMW MC" or "Respondent"), filed its exceptions to the Administrative Law Judge ("ALJ") decision issued in this matter on December 1, 2017. Respondent set forth therein the numerous factual and legal deficiencies in the ALJ's findings and conclusions. Charging Party (or "the Union") responded with an Answering Brief filed on March 9, 2018, which attempted to justify the erroneous rulings of the ALJ. For the reasons set forth below, the Brief filed by the Union does not provide factual or legal justification for the Board to uphold the ALJ's decision, which is not supported by the record or applicable law.

II. THERE IS NO BASIS FOR FINDING THAT MANAGERS CREATED THE UNLAWFUL IMPRESSION OF SURVEILLANCE

First, like the ALJ's decision, the Union's brief fails to distinguish this case from *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270 (2005). In addressing the issue of surveillance in a similar context—a Yahoo! internet page dedicated to discussions about the union and other employment issues—the Board considered whether an employee would have reasonably assumed from a manager's comment about the page that union activities were being surveilled. The manager had obtained information about the Yahoo group when an employee showed him one of the posts and then emailed him a copy. *Id.* The Board found that a reasonable employee would assume the manager learned of the post "exactly the way [the manager] did—through public dissemination by another website subscriber." *Id.* at 1276. The Board came to this conclusion

based on testimony similar to that elicited in this case. There, the Board considered evidence that a page member could not be sure the site was restricted only to the potential union members; here, Lawter and Pearson testified to the same issue. The Union points to the vetting process to add members, but there was no evidence that anything about this process was stated to members such that the non-administrator "reasonable employee" would have these additional indications of privacy. Even if they did, such restrictions on membership then cut the other way, making it less reasonable that a manager was able to personally view the site. *See, 2010* GCM LEXIS 51 (finding that because employee "had restricted access to her friends, she would not reasonably conclude that her employer was directly monitoring her Facebook page"). In *Frontier*, there was no evidence of anything written on the website indicating it was restricted to potential union members only; no such evidence of a written notice of restriction was offered here either.

The Board also noted that there was no publicized requirement that members keep the site's existence a secret in *Frontier*. Again, in this case, there is likewise no evidence that the site's existence was a secret. Finally, in *Frontier*, evidence showed that any subscriber to the website could show posts to anyone else. Lawter testified that he knew that it was possible for a member of the Car Mill site to show a manager information posted there. (Tr. 139). The Union tries to distinguish from *Frontier* by stating that, here, "Kirby's statements to Pearson about the car mill were very detailed and specific."[1] However, in *Frontier*, the manager explicitly said that he "knew about the Yahoo group and what [an employee] had posted." *Frontier* at 1275. Even in Pearson's account of what happened here, Kirby denied ever being on the site and only mentioned events widely discussed throughout the plant.

Kirby's comment about publicly known issues cannot create an impression of surveillance.

[1] Note that no distinction is made for the situation involving Epps and Lawter. The Union effectively concedes Epps' alleged comment is squarely within the holding of *Frontier*.

See RCC Fabricators, Inc., 352 NLRB 701 (2008). Based on the precedent established in *Frontier*, a reasonable employee would not conclude from Kirby's alleged comments that he was surveilling union activity. Further, it is illogical that the impression of surveillance could be created when *actual* surveillance is entirely disclaimed. The Union stresses the theory that Kirby and Epps did "something out of the ordinary" to obtain information about the Union. First, this case is not one of actual surveillance, so the standard to use is that of creating an impression of surveillance. Second, Pearson testified that Kirby said he had been told about certain things on the Car Mill site by other people. When a manager is told about union activities from another employee, the Board has found no violation of the law. *See, e.g., Park 'N Fly, Inc.,* 349 NLRB 132 (2007). Again, this is the same scenario the Board considered in *Frontier* where a manager was told about Union activity by an employee and the Board determined a reasonable employee would not find that to create the impression of surveillance. *Frontier* at 1275-76. In fact, in this case it is even clearer that an impression of surveillance was not created than in *Frontier*; here, the Lawter and Pearson, not the supervisors, initiated the conversations at issue. Further, in the instance involving Pearson, he was the one who first brought up the Car Mill site. The circumstances of these conversations as well as the undisputed testimony of Kirby explicitly denying to Pearson that he been on the Car Mill site make clear that an impression of surveillance was not created.

The Union then cites to *Camaco Lorain Manufacturing*, 356 NLRB 1182 (2011), and *Quickway Transportation, Inc.*, 354 NLRB No. 80 slip op. (2009)[2], in an effort to justify the ALJ's finding of an impression of surveillance. These cases are readily distinguishable from the factual scenarios here, firstly because neither case dealt with open union supporters. Additionally, in *Camaco Lorain*, the union campaign was very secretive and meetings were not openly discussed

[2] *Quickway* was abrogated by *New Process Steel v. NLRB*, 560 U.S. 674 (2010).

around the facility. So a comment by a manager asking clandestine union supporters about a specific union meeting clearly implied surveillance. *Id.* In *Quickway*, an employee was questioned about his support of the union and involvement in starting it up in the context of an extended conversation about the union. Here, comments were allegedly made to open union supporters and the comments were about information widely-discussed around the plant. It is undisputed that it was Pearson, not Kirby, who first brought up the Car Mill site. Kirby also explicitly denied having been on the Car Mill site when Pearson accused him of doing so. This case is not comparable to *Camoco Lorain* or *Quickway*; rather, *Frontier* is the controlling case based on the extensive factual similarities.

In light of the record evidence as well as established Board precedent, there is no basis for a finding that either Corey Epps or Chris Kirby unlawfully created an impression of surveillance of union activities. Thus, the ALJ's findings on all related issues should be overturned.

III. ALLEGATIONS RELATED TO RESPONDENT'S POLICIES

The ALJ's findings regarding Respondent's policies are based upon the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which the Board recently overruled in *The Boeing Company*, 365 NLRB No. 154 (2017).[3] The GC concedes that the work rules

[3] A challenge has been raised that Member William Emanuel should not have participated in the *Boeing* decision due to an alleged conflict of interest. Respondent asserts that even if *Boeing* is vacated, the rule announced in *Boeing* should be otherwise adopted by the Board as it is consistent with prior Board law. *See, e.g., Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011) (noting the "weighty" interests associated with patient confidentiality); *GTE Lenkurt, Inc.*, 204 NLRB 921, 921-22 (1973) (upholding handbook provision limiting right of off-duty employees to be on employer's premises based on balancing Section 7 rights against the employer's private property rights); *Peyton Packing Co.*, 49 NLRB 828, 843 (1943) (upholding no-solicitation rule because employer's interest in production during working time outweighed Section 7 rights of employees to engage in solicitation). *See also NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (finding that the Board has the "duty to strike the proper balance between…asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (discussing the balancing of "intended consequences upon employee rights against the business ends to be served by employer's conduct"); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945) (finding there must be a "working out [of] an adjustment between the undisputed right of self-organization…and the equally undisputed right of employers to maintain discipline in their establishments").

regarding "threatening or offensive" language and prohibiting recording within the BMW MC facility may be found lawful under *Boeing.* The Union, however, makes a futile attempt to argue these rules are unlawful. In particular, the Union claims that Respondent's recording policy is overbroad. The Union suggests that the policy restrict recordings only when the plant is not open for public tours and, then, only to certain areas of the plant and certain proprietary items. This type of recording ban is simply unrealistic. Managers would be required to monitor use of recording and photography devises to discern exactly what associates were recording and for what purpose. But, of course, management would not be allowed to ask associates any questions about what they were doing because then the Union would claim unlawful interrogation! Or, at the very least, associates could respond with "for a Union purpose" as a "get out of jail free" card. And, if managers misinterpreted what an employee was recording and inaccurately applied this unclear policy, that would also give rise to union complaints. Applying a policy in the way the Union proposes just sets a trap. Under *Boeing*, Respondent has weighty, legitimate business interests behind the no recording policy, and associates have ways they can record safety issues or other concerns in compliance with the policy and, importantly, without manager approval. Off line support and other hourly associates with photography passes may record items needed by employees. The Union's claim that management approval is necessary is without support in the record. Thus, employees' Section 7 rights are minimally, if at all, impacted by the rule as it stands. Revising the rule, as the Union suggests, fails to protect Respondent's business needs and only opens the door for problems in its application. Respondent's current recording policy is clearly lawful under *Boeing* and should be permitted to stand.

Looking to the other challenged rules, "[i]n determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill

employees in the exercise of their Section 7 rights." *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011). While the law states that the GC does not have to provide affirmative evidence to prove that employees were in fact chilled in their union activity, the law does not preclude consideration of evidence that employees were not chilled in their union activities because of an employer rule. This evidence that employees' union activities were not chilled cuts against a finding that the rule "reasonably tend[s] to chill" union activity. Here, there is clear, undisputed evidence of union activity occurring openly at Respondent's facility for years. The work rules challenged here have been in place throughout this time. Employees clearly have not been chilled in their exercise of Section 7 rights as they have openly engaged in solicitation, distributed union literature, worn union paraphernalia, engaged in pro-union discussions, established a volunteer organizing committee, spoken to the media, complained about terms and conditions of employment, carried pro-union signs, and handbilled, among other activities in support of the union. (Tr. 11, 152, 290-91). It is illogical to find that work rules maintained throughout the time these activities were openly occurring (without discipline by management) could *reasonably* have a chilling effect on protected activity. Finding the rules "chilling" without acknowledging the ongoing union activity views the rules in an isolated bubble not required by the Board.

Specifically, with regard to the solicitation policy, Respondent submits that *Boeing* requires a re-evaluation of prior precedent, such as *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295 (2011), and *Our Way, Inc.*, 268 NLRB 394 (1983). To the extent such prior cases have found that an unqualified right exists to engage in solicitation in working areas, during non-work time, these holdings should be re-examined according to the analysis of *Boeing.*

The NLRB has consistently found that a rule prohibiting distribution of literature in

working areas is lawful because such a rule is justified by the employer's legitimate business need to maintain work areas free of litter. *See e.g. Stoddard-Quirk,* 138 NLRB 615 (1962). The same justification exists for solicitation, where union cards are being passed around for signatures. *See Conagra Foods, Inc.*, 361 NLRB No. 113, 2014 NLRB LEXIS 902, *7 (2014) (finding that the presentation of an authorization card is "integral and important to the solicitation process"). Moreover, Respondent provides team areas and various other mixed use or non-working areas within the facility where solicitation can be done outside working areas. Thus, working areas are not the only place employees have access to within the BMW MC facility in which the union's purpose can be accomplished.

Boeing also controls the analysis of Respondent's workplace civility policy that Associates should "demonstrate respect for the Company." Because the rule does not explicitly prohibit Section 7 activity and in light of the fact that the rule has not been communicated or applied to prohibit such Section 7 activity, it is clearly lawful as a category 1 rule under the *Boeing* analysis. The same is true for Respondent's policy that Associates should not "engage in behavior that reflects negatively on the Company." In both cases, the Respondent has a legitimate business interest in protecting the brand it has spent many years building. (Tr. 247-50; Resp. Ex. 6). There is clearly a lawful purpose for the rules unrelated to prohibiting Section 7 activity. Thus, even if the rule were analyzed as a category 2 rule under *Boeing*, the legitimate business interests would clearly counterbalance any potential limitation on protected employee activities.

IV. ROGER YOUNGBLOOD DID NOT VIOLATE THE ACT IN HIS CONVERSATION WITH ASSOCIATES

The Union relies on testimony that Youngblood demanded to Gill, "Give me those papers," to support the claim that he unlawfully interrogated union supporters. But the Union ignores the fact that none of the witnesses knew what papers Youngblood was talking about. Quite the

opposite—Gill, Deese, and Evans each stated that they did not know what Youngblood was talking about. (Tr. 30-31, 73, 94). There is no evidence that by asking about "papers", Youngblood was seeking information about union activities of employees. There is no possibility that the witnesses understood Youngblood to be asking about union related "papers" as they specifically denied that they knew what type of "papers' he was asking about. Therefore, there is no basis for concluding that the conversation was a coercive interrogation.

As to the claim regarding Youngblood's alleged unlawful restriction on Gill's right to solicit, the law is clear that employees do not have the right to solicit during working time. *See, e.g., Peyton Packing Co.*, 49 NLRB 828, 843 (1943). The Board has "consistently held that solicitation for a union usually means asking someone to join the union *by signing his name to an authorization card at that time*" and that the presentation of an authorization card is "integral and important to the solicitation process." *Conagra Foods, Inc.*, 361 NLRB No. 113, 2014 NLRB LEXIS 902, *7 (2014) (emphasis added) (internal quotation marks omitted) (citing *W.W. Grainger, Inc.*, 229 NLRB 161, 166 (1977) and *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970)). As Gill testified himself, he was told not to *solicit* during working time. (Tr. 45). This instruction does not violate the Act.

V. CONCLUSION

The ALJ's findings are clearly not supported by applicable law or the evidence presented in this matter and the Complaint should be dismissed.

[*SIGNATURE BLOCK ON FOLLOWING PAGE*]

Dated this 23rd day of March, 2018.

Respectfully submitted,

D. Christopher Lauderdale
lauderdc@jacksonlewis.com
Emily K. O'Brian
emily.obrian@jacksonlewis.com
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
(864) 232-7000 – Phone
(864) 235-1381 – Fax
ATTORNEYS FOR RESPONDENT

AMENDED CERTIFICATE OF SERVICE

I, D. Christopher Lauderdale, hereby certify that on March 23, 2018, I submitted the **RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGE** to the Office of the Executive Secretary via the NLRB's E-filing Program and emailed a copy to:

Chip Harrell
Regional Director NLRB Region Ten
claude.harrell@nlrb.gov

Kiersten Meyers
Attorney, NLRB Region Ten
kierstein.meyers@nlrb.gov

James D. Fagan, Jr.
Attorney for International Union UAW
JimF@sfglawyers.com

D. Christopher Lauderdale
lauderdc@jacksonlewis.com
Emily K. O'Brian
emily.obrian@jacksonlewis.com
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
(864) 232-7000 – Phone
(864) 235-1381 – Fax
ATTORNEYS FOR RESPONDENT